DOCKET NO. TOS-157-USA-PCT

REMARKS

The Examiner is thanked for the very thorough and professional office action. Pursuant to that office action, the Specification and the Abstract have been amended to follow the format suggested by the Examiner, and correct a typographical error in Table 2, under "Example 4". In addition, Claims 1-3 and 5 have been amended to more definitely set forth the invention and obviate the rejection. Support for the amendment of claim 1 can be found in the Specification on page 16, line 12. The present amendment is deemed not to introduce new matter. Claims 1-7 are in the application.

Respecting the Examiner's discussion of the listing of references in a search report, the Examiner is hereby advised that an Information Disclosure Statement is being filed concurrently herewith in compliance with 37 CFR 1.98(a)(2).

Respecting the Examiner's objection to the Abstract, a revised Abstract is submitted herewith which is believed to conform to the requirements of MPEP ¶608.01(b). Withdrawal of the objection to the Abstract is accordingly respectfully requested.

Respecting the guidelines for the Specification set forth in paragraph 4 on pages 3 and 4 of the office action, the Specification has been amended herein to conform to the suggested guidelines. In view of said amendments, it is believed that the Specification fully conforms with 37 CFR 1.77(b). Withdrawal of the objection is accordingly respectfully requested.

Respecting the title of the invention, the title has been amended so as to be indicative of the

invention to which the claims are directed. In view of said amendments, it is believed that the objection is now moot. Withdrawal of the objection to the title is accordingly respectfully requested.

Respecting the trademarks mentioned in the Specification, it is believed that each of these trademarks mentioned in paragraph 6 on pages 4 and 5 of the office action are capitalized since the first letter of each word is a capital letter.

Reconsideration is respectfully requested of the rejection of Claims 1-7 under 35 U.S.C. 112, second paragraph, as being indefinite in failing to indicate that the gel mixture was ever heated.

Claim 1 has been amended to clarify that, after dissolution of a hydrophilic compound having a gellation ability in water or an aqueous component, cooling below the gellation temperature to form a gel which is then pulverized is carried out. It is respectfully urged that one of ordinary skill in the art would understand that the hydrophilic compound was dissolved in water or an aqueous solution at a temperature above the gellation temperature. Therefore, it may be unnecessary to actually heat the water or aqueous solution, depending upon the gellation temperature of the hydrophilic compound.

It is further respectfully urged that one of ordinary skill in the art would understand from Claim 1, as now amended herein, that the dissolution of the hydrophilic compound occurs above the gellation temperature. It is therefore believed that the claims are not indefinite, and would be understood by one of ordinary skill in the art. Withdrawal of the rejection is accordingly respectfully requested.

Reconsideration is respectfully requested of the rejection of Claims 1-7 on the ground of non-statutory obviousness-type double patenting as being unpatentable over Claims 1, 5, 7, 11 and 16 of co-pending application 09/936,317, in view of machine translation of JP 2000-219609A of Sato, et al.

It is respectfully urged that this double patenting rejection is improper because the U.S. application 09/936,317 is currently under final rejection, and no claims have been allowed therein. In view of the final rejection, and the absence of any allowed claims in the respective application, there can be no double patenting, provisionally or otherwise. It is therefore respectfully urged that the double patenting rejection is improper and unwarranted. Consequently, it is believed that the Examiner would be justified in no longer maintaining the rejection. Withdrawal of the rejection is accordingly respectfully requested.

Reconsideration is respectfully requested of the rejection of Claims 1-7 under 35 U.S.C. 103(a) as being unpatentable over Delrieu, et al. in view of Sato, et al.

The Examiner's primary reference of Delrieu, et al. is concerned with a cosmetic or dermatological delivery system of a gel delivery system for a topically applied active agent. In particular, the delivery system of Delrieu, et al. is comprised of discreet gel particles formed of:

(a) an agar gel, and

(b) a restraining polymer dispersed in the agar gel, the restraining polymer having sufficient molecular weight to prevent egress of the restraining polymer from the agar gel, and

having retention groups to bind an active agent to the restraining polymer for retention in the gel particles.

These gel particles are manually crushable on the skin to increase the surface area of the gel particle material and expose the restraining polymer to the skin or other body surface for release of the active agent. (see Delrieu, et al., column 4, lines 6-20) This delivery system can be applied in either an oil-in-water or water-in-oil emulsion.

In the rejection, the Examiner recognizes that the primary reference of Delrieu, et al. "does not disclose any cosmetic compositions where the other ingredients are specifically disclosed, or the specific percentages for the components". It is therefore clear that the primary reference of Delrieu, et al. fails to disclose the water-in-oil emulsion called for in the claims herein, especially the particular components and the percentages of each of the components.

The Examiner then relies upon the secondary reference of Sato, et al. to supply details concerning the water-in-oil emulsion. Specifically, the Examiner relies upon Sato, et al. to show a water-in-oil emulsion containing an organophilic clay mineral and an emulsifier having an HLB value of seven or less in the oil phase. However, the Sato, et al. reference fails to cure the deficiencies of the primary reference of Delrieu, et al., since there is no disclosure in the secondary reference of a water-in-oil emulsion containing a microgel as called for in Claim 1 herein.

It is respectfully urged that there is no teaching, suggestion or motivation in either of the references relied upon to combine them in the manner suggested by the Examiner. Further, it is unclear from the rejection whether the Examiner considers the agar gel particles of the Delrieu, et

al. reference to function in the same way as the microgel particles called for in Claim 1 herein. It is respectfully pointed out that the agar gel particles in Delrieu, et al. contain a restraining polymer dispersed in the agar gel which differs from the microgel called for in Claim 1 herein. In view of the differences and the lack of any disclosure in the Examiner's primary reference of Delrieu, et al. of the components forming the water-in-oil emulsion, it is respectfully submitted that the Examiner's combination of references fail to teach or suggest the emulsion now called for in the claims herein.

The issue presented herein is whether claims 1-7 of the instant application are unpatentable under 35 U.S.C. 103(a) over Delrieu, et al. in view of Sato, et al. Applicant respectfully submits that the answer to this question is in the negative. It is respectfully urged that, in the rejection, the Examiner has failed to comply with the dictates of the recent Supreme Court decision of *KSR International Co. v. Teleflex, Inc., et al.* 127 S.Ct. 1727 (2007), wherein the Court indicated, on page 2, that "the framework for applying the statutory language of §103" is found in *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966). In particular, "[u]nder §103, the scope and content of the prior art are to be determined; differences between the prior art and claims at issue are to be determined; and the level of ordinary skill in the pertinent art are to be resolved. Against this background the obviousness or nonobviousness of the subject matter is determined."

In addition, after the Supreme Court decision in *KSR International Co. v. Teleflex, Inc., et al.* cited above, the Deputy Commissioner of Operations for the USPTO issued an internal memorandum to all technology directors instructing them that when making an obviousness

rejection "it remains necessary to identify the reason why a person of ordinary skill in the art would have combined the prior art elements in the manner claimed" (see internal memorandum of Focarino, Margaret, Deputy Commissioner of Operations, USPTO, to USPTO technology art unit directors, May 3, 2006).

It is respectfully submitted that, in the rejection, the Examiner failed to follow the dictates of the above cited *KSR International Co. v. Teleflex, Inc., et al.*, *Graham v. John Deere Co. of Kansas City*, and the above mentioned internal memorandum. It is believed that the Examiner failed to provide a valid reason why a person of ordinary skill in the art would have combined the prior art elements in the manner claimed. Specifically, the reason given by the Examiner is identical to statements in the Specification on page 1, lines 19-23. However, the Specification goes on to state, on page 1, lines 23-25, that if you increase the viscosity of the oil phase by blending in a solid and semi-solid oil component to produce a more highly stable emulsion, an undesirable oil and sticky sensation during use will result.

Therefore, the problem solved by the present invention is to produce a water-in-oil emulsion having a satisfactory sensation during use of smoothness, moistening sensation, and non-stickiness, as well as satisfactory emulsion properties, long term stability, and stability over high and low temperature ranges. Accordingly, the present inventors set forth in the Specification numerous test examples of the present invention, and comparative tests of similar compositions that do not have all of the components called for in the claims herein. These numerous test results are set forth in Table 1 on page 25, Table 2 on page 26, and Table 3 on page 28.

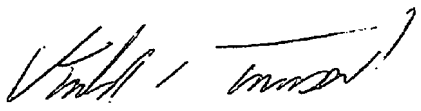
There it can be seen that some compositions containing the claimed organophilic clay

mineral may produce a stable emulsion but fail to have satisfactory properties of non-stickiness, smoothness, or moistening sensation. It is respectfully submitted that the reasons for the Examiners combining of references fails to take into account the problems confronted by the inventors and the scope and content of the prior art as a whole. For these reasons, it is believed that the Examiners reasons for combining the references fails to meet the legal standards set forth in the above cited authorities. Consequently, the Examiner would be justified in no longer maintaining the rejection. For these reasons, the Examiner would be justified in no longer maintaining the rejection. Withdrawal of the rejection is accordingly respectfully requested.

In view of the foregoing, it is respectfully submitted that the application is now in condition for allowance, and early action and allowance thereof is accordingly respectfully requested. In the event there is any reason why the application cannot be allowed at the present time, it is respectfully requested that the Examiner contact the undersigned at the number listed below to resolve any problems.

Respectfully submitted,

TOWNSEND & BANTA



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CERTIFICATE OF TRANSMISSION

I hereby certify that this facsimile transmission, consisting of a 14-page Amendment, as well as 1-page Transmittal, in U.S. patent application serial No. 10/501,462, filed on December 13, 2004, is being facsimile transmitted to the U.S. Patent and Trademark Office (Fax no. 571-273-8300) on November 13, 2007.

Donald E. Townsend